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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

UNITED STATES OF AMERICA,

Petitioner,

v.

ALLEN KAISER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR RESPONDENT

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No. 858

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MEMORANDUM FOR RESPONDENT

Respondent adopts, for purposes of this Memorandum, the material in the Government's Petition under the headings, "Opinions Below," "Jurisdiction," "Question Presented," "Statute and Rulings Involved," and "Statement."

Argument

1. *The decision of the court below is plainly correct.*

Although section 61(a) of the 1954 Code defines "gross income" to mean "all income from whatever source de-

rived," the Commissioner of Internal Revenue, as the court below noted, "has long acknowledged that the concept of taxable income does not include all receipts even though such receipts were not specifically excepted from taxable income by statute." Pet. 13 and rulings cited. The court below concluded that the strike benefits received by the taxpayer are properly within the general category of receipts not deemed taxable income.

This conclusion is unassailable. Strike benefits are similar in their nature and purpose to the many types of receipts which have been held not to constitute income. Strike benefits are closely comparable, for example, to retirement benefits paid under the Federal old age and survivors insurance system; social security benefits paid by Panama; unemployment benefits paid by a state; food, medical supplies and other forms of subsistence furnished to disaster victims by the American Red Cross; and rehabilitation payments made to victims of a tornado disaster from a special fund set up by an employer in a disaster area for the benefit of employees and their families and pensioners; I.T. 3447, 1941-1 C.B. 191; Rev. Rul. 56-135, 1956-1 C.B. 56; I.T. 3230, 1938-2 C.B. 136; Special Ruling, 5 Stan. Fed. Tax Rep. (1952) par. 6196; Rev. Rul. 131, 1953-2 C.B. 112. All these benefits have been held not to constitute income and are, therefore, not subject to tax. The Government makes no attempt in its Petition to distinguish these clearly-analogous situations from the case at bar or to indicate any ground for treating strike benefits differently from these quite similar categories of receipts.

The court below is also on solid ground in the second basis for its conclusion, namely that the strike benefits partook of the nature of gifts. The court's basic reasoning was that there was no consideration flowing from the recipients of the benefits and that the benefits were, accordingly, prop-

erly to be classified as gifts.* The Government makes no answer in its Petition to the court's clear and convincing reasoning.

All the Government does is to refer to the Commissioner's reliance upon an asserted administrative policy; but this reliance is totally misplaced. The Service's administrative position was expressed in an obscure ruling, O.D. 552, 2 C.B. 73 (1920) (Pet. 34) dealing with strike benefits "received from a labor union by an individual member while on strike." No other public reference was made to the problem until 1957 when the Service issued Rev, Rul. 57-1, 1957-1 C.B. 15 (Pet. 35). It has never been dealt with in a Regulation. The court below refused to apply the reenactment doctrine, noting that the "Government has made no showing that the 1920 rule was ever considered by Congress." (Pet. 16). Nor has the ruling ever been considered by the courts. See Pet. App. A. Accordingly, the court below very properly refused to give weight to the old O.D. and reached the only possible result: that strike benefits are not taxable income.

2. *We respectfully suggest that, of the three possible alternative courses of action open to the Court, affirmance would appear most appropriate.*

The three possible alternatives, of course, are:

(i) The Court may decide to deny certiorari because of the absence of a conflict of decisions.

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*The dissenting judge's disagreement with the majority was based on the fact that "participation in the strike" (Pet. 17) was a requisite to strike benefits. But how could it have been otherwise? The payments were "*strike* benefits." What possible basis could there have been for paying *strike* benefits to people not on strike? The fact that benefits are limited to a particular class does not thereby make them taxable; for example, retirement and unemployment benefits paid under the Federal social security system are limited to a particular class, but the Commissioner has nonetheless held that they are not taxable income.

(ii) The Court may, however, give heed to the Solicitor General's plea that "the issue is a continuing and growing one affecting a very large number of taxpayers, who are generally in the lowest tax brackets and can ill afford the costs of litigation" (Pet. 5) and to the position of the Internal Revenue Service that, "despite the decision below," it will not "abandon its long-standing position, either administratively or in litigation, unless and until authoritatively rejected" (Pet. 4). In view of these considerations and particularly in view of the great number of low-bracket taxpayers involved, the Court may desire to grant certiorari and hear argument on the merits despite the absence of real doubt as to the correctness of the decision below. We concur in the Government's conclusion that the decision in the instant case "raises a question of general importance in the administration of the tax laws which should be reviewed . . . notwithstanding the absence of a conflict of decisions" (Pet. 5).

(iii) The third alternative, and, we respectfully submit, the most appropriate one, would be for the Court to grant certiorari for the reasons indicated in paragraph (ii) above, and to affirm the decision below as plainly correct. *Cf. United States* v. *Lane Motor Co.*, 344 U.S. 630. The question here in issue is presented in so many cases, each of which involves a small amount, that the Internal Revenue Service has issued an order to its field officers requiring the maintenance of these cases in status quo, pending the decision of the present case. News Release No. IR-290, dated May 1, 1959. The suggested summary affirmance would be the most expeditious way of disposing of this widespread problem and would resolve the controversy created by the intransigence of the Internal Revenue Service without burdening this Court's docket.

Conclusion

It is respectfully submitted that, of the three alternatives available to the Court, the issuance of the writ and the summary affirmance of the decision below, would appear the most appropriate course.

Respectfully submitted,

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